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No. 88-1906

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In the Supreme Court of the United States

OCTOBER TERM, 1989

SIMON NASH, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Health and Human Services' Quality Assurance System violated petitioner's right of decisional independence as an ALJ.

2. Whether petitioner has standing to challenge the Secretary's policy of non-acquiscence in his capacity as an ALJ.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 869 F.2d 675. The opinions of the district court (Pet. App. 16a-31a, 33a-35a, 36a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 68a-69a) was filed on March 7, 1989. The petition for a writ of certiorari was filed on May 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an Administrative Law Judge (ALJ) in the Social Security Administration's Bureau of Hearings and Appeals. The respondents are the Secretary of Health and Human Services, the Commissioner of the Social Security Administration, the Director of the Office of Personnel Management, and various officials of the Bureau of Hearings and Appeals within the Social Security Administration.

In 1975, the Bureau was faced with a backlog of more than 113,000 cases. To reduce the backlog, the Bureau set up several programs for its ALJs. Three are relevant here. Under the "Peer Review Program," the Bureau engaged in post-adjudicatory review of ALJ decisions and offered instructions to ALJs on the length of hearings and opinions and the use of expert witnesses. Through the "Quality Assurance System," the Bureau monitored the rates at which ALJs reversed state decisions not to award Social Security benefits, attempted to identify recurring problems, and made recommendations for improving the hearing process. Finally, the Bureau established monthly production goals to reduce delays experienced by claimants. Pet. App. 48a, 49a-50a.

In 1978, petitioner filed suit in district court challenging the enforcement of these programs as inconsistent with the "decisional independence" (Pet. App. 46a) of ALJs. The district court dismissed petitioner's action in 1979 for lack of standing. *Id.* at 61a-67a.

The court of appeals reversed in substantial part. 613 F.2d 10 (1980) (*Nash I*) Pet. App. 44a-60a. Stating that the Administrative Procedure Act (APA) conferred on ALJs a "special status" and a "qualified right" of decisional independence (*id.* at 55a), the court held that petitioner's complaints with respect to the Peer Review Program, the

Quality Assurance System, and monthly production goals fell "within the zone of interests protected by the Administrative Procedure Act and Social Security Act" (*id.* at 53a), and remanded to the district court for further proceedings.

2. Following the remand, petitioner amended his complaint to add a challenge to the Secretary's policy of nonacquiescence. That claim was dismissed by the district court for lack of standing (Pet. App. 42a), and the remaining claims were tried by the court. After a bench trial, the district court held in favor of the respondents on all counts. *Id.* at 16a-32a. Relying on *Nash I*, the district court began with the assumption that the APA provided petitioner with a right of action against the respondents. *Id.* at 17a. Nonetheless, the court found that the Peer Review Program was "primarily educational" and that the Bureau's "goal [was] more accurate initial decisions that better reflect the views of the agency on questions of law and policy" (*id.* at 22a). The court concluded that this was a "legitimate and lawful response to the wide disparity in legal and factual determinations among ALJs" (*id.* at 23a-24a). With respect to the Quality Assurance System, the court credited Bureau evidence that demonstrated that " 'there is *no* goal to reduce reversal rates—there is a goal to improve decisional quality & [*sic*] consistency which is assumed to have as one effect a reduction of the reversal rate' " (*id.* at 29a (quoting PX 106; emphasis in original)). The court acknowledged that petitioner had offered evidence that in two locations, New Orleans, Louisiana, and Fort Smith, Arkansas, AJLs had been pressured to lower the rates at which they reversed the denial of benefits by state agencies (*id.* at 29a). The court found, however, that the pressure in New Orleans "did not come only from the agency but rather from the ALJ-In-Charge"

and that he was "specifically reprimanded" for his actions (*id.* at 30a). The court also found that the Bureau was concerned about reversal rates at Fort Smith, but, here again, "the concern with reversal rates was * * * a reflection of problems in the adjudicatory process" (*ibid.*). The court concluded that "while it is clear that the agency was concerned about reversal rates, the evidence does not support the allegations that ALJs were subject to any direct pressure to maintain a given rate" (*ibid.*). Finally, the court found that the Bureau had not established "quotas" (*id.* at 25a) to mark the production level of ALJs, but rather had only set "reasonable production goals" (*id.* at 26a). The court found that the target was "not 'etched in stone,' [was] not a prescription of how, or how quickly, an ALJ should decide a particular case," and "[did] not dictate the content of the decision" (*id.* at 27a). Accordingly, the court concluded that "goals, reasonably fixed and applied, [were not] an infringement of the judicial independence of an ALJ" (*id.* at 28a).

3. The court of appeals affirmed the district court's judgment in all respects. 869 F.2d 675 (1989) (*Nash II*); Pet. App. 1a-15a. First, the court affirmed the order dismissing petitioner's non-acquiescence claim for lack of standing. The court reasoned that the "only adverse consequence" for petitioner was that "his decisions are subject to reversal by the Secretary" (*id.* at 6a). The court held that this was a legally insufficient interest to confer standing on petitioner.

Next, the court addressed petitioner's decisional independence claims. It held that petitioner's challenges to the Peer Review Program and Quality Assurance System were barred by the prior judgment in *Association of ALJs* v. *Heckler*, 594 F. Supp. 1132 (D.D.C. 1984). The court observed that petitioner was "a member of the Associa-

tion, that he consulted with the Association's counsel about the D.C. district court litigation, and that he shared certain documents with the Association for use in its case" (Pet. App. 8a-10a). It ruled that petitioner "appears to have had a full and fair opportunity to be heard in that case" (*id.* at 10a).

Although there were "very substantial, if not dispositive, arguments in favor of application of the rule of *res judicata,*" the court felt "obliged to reach the merits of [petitioner's] claims in view of our strong intimation in *Nash I* that [petitioner] was entitled to a plenary trial" (Pet. App. 10a-11a). Before doing so, the court clarified that its reference to a "qualified right of decisional independence" of ALJs (*id.* at 55a) in *Nash I* was "*dicta*" and explained that "*Nash I* stands only for the narrow premise that [petitioner] has standing to pursue his claims" (*id.* at 8a). The court declined to resolve whether petitioner had a cause of action under the APA, however, because "the district court rejected [petitioner's] claims on their merits" (*ibid.*). Thus, the court proceeded on the assumption that petitioner had a right of decisional independence separate and apart from the statutory protections attaching to his pay, tenure, and freedom from performance reviews.

Realizing that "[p]olicies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged" (Pet. App. 11a), the court could find "no reason to disturb [the district court's] determination" that the Peer Review Program and production goals "operated as[] a quality control measure" (*id.* at 12a). The court then turned to petitioner's claims regarding the Quality Assurance System, which the court thought might be "cause for concern" (*id.* at 13a). However, after referring to record evidence indicating that "reversal rates were

used as a benchmark in deciding whether there *might* be problems in the adjudicatory methods of particularly high (or low) reversal rate ALJs," the court concluded that the district court's findings were not clearly erroneous (*id.* at 14a (emphasis in original)). "Since the district court found no direct pressure on ALJs to maintain a fixed percentage of reversals," the court concluded that "the Secretary's policy in this regard did not infringe upon the 'decisional independence' of ALJs" (*id.* at 15a).

ARGUMENT

Petitioner raises two issues for review by this Court: (1) whether the Quality Assurance System violated his right of decisional independence as an ALJ; and (2) whether he has standing to challenge the Secretary's policy of non-acquiescence. Neither issue warrants review. Petitioner's challenge to the Quality Assurance System is barred by *res judicata*; in any event, even assuming that petitioner has a cause of action under the APA for interference with his decisional independence, both lower courts correctly concluded that no such interference had been shown on the facts of this case. And petitioner lacks standing to challenge the Secretary's non-acquiescence practice because he has not suffered the requisite injury-in-fact.

1. a. The petition does not respond to the court of appeals' holding that the challenge to the Quality Assurance System is barred by *res judicata*. See Pet. App. 8a-11a. In *Association of ALJs* v. *Heckler*, 594 F. Supp. 1132 (D.D.C. 1984), a national association of ALJs mounted a "broad challenge to various practices of the Secretary substantially identical to those advanced by [petitioner] in this case" (Pet. App. 9a). The complaint specifically alleged that "the Secretary had infringed upon the decisional independence of ALJs through policies and practices de-

signed to monitor the decisions of ALJs and 'pressure [them] into disposing of . . . larger numbers of cases each year' and 'into deciding fewer cases in favor of claimants' " (*ibid.* (quoting Compl. para. 18 in *Association of ALJs*; brackets and ellipsis in original)). It is uncontroverted that petitioner was a member of the Association, consulted with its counsel about the litigation, and shared documents with the Association for use in its case. See *ibid.* It follows that petitioner "appears to have had a full and fair opportunity to be heard in that case" (*id.* at 10a). Petitioner's claim is therefore barred by the judgment in *Association of ALJs*. *Res judicata* fully supports the judgment in this case, and petitioner has offered no reason for questioning the court's ruling on this point.

b. Even if petitioner's claims were not barred by *res judicata*, the court of appeals' alternate holding rejecting the claim on the merits would not warrant review. Petitioner claims an intra-circuit conflict between *Nash I* and *Nash II* and an inter-circuit conflict between *Nash I* and a decision of the Seventh Circuit, *D'Amico* v. *Schweiker*, 698 F.2d 903 (1983), over whether the APA grants ALJs a cause of action for infringement of their decisional independence. See Pet. 9-13, 23. However, *Nash I* does not conflict with the other decisions because, as the court of appeals explained in *Nash II*, its prior statement that the APA "confer[s] a qualified right of decisional independence upon ALJs" (Pet. App. 55a), was *dicta*. The court of appeals decided *Nash I* on an appeal from the district court's judgment dismissing petitioner's action for lack of standing, and so did not reach the merits of petitioner's claim. Thus, "*Nash I* stands only for the narrow premise that [petitioner] has standing to pursue his claims" (Pet. App. 8a). See also *id.* at 4a.* Cf. *Goodman* v. *Svahn*, 614

* There is no inconsistency in holding that a party has standing but has no cause of action. See *Council of & for the Blind* v. *Regan*, 709

F. Supp. 726, 729 n.3 (D.D.C. 1985) (*Nash I* "simply held that an ALJ * * * was improperly dismissed for lack of standing. * * * [I]ts decision on standing had no bearing on the merits of Nash's claim.").

Nor is there an "apparent conflict" (Pet. 12) between this case and *D'Amico* v. *Schweiker*, *supra*. *D'Amico* "only * * * consider[ed ALJs'] standing to sue" to challenge a Social Security Administration instruction concerning retroactive cessation of benefits. 698 F.2d at 904. It made no statement regarding a possible cause of action to enforce ALJs' decisional independence and hence does not conflict with the decision in this case. Any tension that exists is between *D'Amico* and *Nash I*—*D'Amico* held that ALJs lacked standing while *Nash I* held that they did. But these judgments are not before the Court, and, in any event, *D'Amico* found *Nash I* distinguishable on the facts. See 698 F.2d at 906-907.

c. This case would not, in any event, be an appropriate vehicle for review of the question whether ALJs have a cause of action to enforce their decisional independence, because petitioner would not prevail even if such a right is recognized. The district court assumed that "[a]ny attempt by the agency to mandate a prescribed reversal rate for the ALJ corps would clearly be inappropriate and would constitute an infringement of ALJs' decisional independence" (Pet. App. 30a). Nevertheless, the district judge found that "[i]n this case, while it is clear that the agency was concerned about reversal rates, the evidence does not support the allegations that ALJs were subject to any direct pressure to maintain a given rate" (*ibid.*). Accordingly, the district court found that the Secretary's practices "did not

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F.2d 1521, 1524-1525 & n.12 (D.C. Cir. 1983) (en banc) (holding that plaintiff failed to state a claim notwithstanding earlier decision that plaintiff had standing).

infringe on the decisional independence of ALJs" (*id.* at 31a).

Petitioner asserts that the court of appeals erred in affirming the district court's findings concerning the Quality Assurance System, and specifically that an incident involving ALJs in New Orleans demonstrates that the policy infringed ALJs' decisional independence. See Pet. 13-19. The district court, however, determined that the pressure in New Orleans originated in factors unique to that office ("the evidence shows that the pressure in [the New Orleans] office did not come only from the agency but rather from the ALJ-In-Charge, Carl Sarett" (Pet. App. 29a-30a)), and hence that episode cannot be relied on by petitioner—a Buffalo, New York-based ALJ—to substantiate the infringement of his decisional independence. The New Orleans incident was not evidence of deficiencies in the Secretary's policy and the ALJ-In-Charge was "reprimanded by Chief ALJ Brown for discussing reversal rates with his ALJs" (*id.* at 30a). The court of appeals reviewed the record before the district court and agreed that there was "no direct pressure on ALJs to maintain a fixed percentage of reversals" (*id.* at 15a). Petitioner's fact-bound question was decided correctly by the lower courts and does not warrant further review.

2. Whatever the merits of the Secretary's policy of non-acquiescence, petitioner lacks standing to challenge it because he has not suffered the requisite injury-in-fact. As the court of appeals explained, "[t]he only adverse consequence for [petitioner] resulting from non-acquiescence is that his decisions are subject to reversal by the Secretary" (Pet. App. 6a). This academic interest falls far short of the "distinct and palpable injury to himself" that petitioner must demonstrate (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)).

Moreover, disappointed claimants have a far more acute and tangible interest in the Secretary's non-acquiescence policy than do ALJs, and they have, on several occasions, demonstrated their willingness to pursue such challenges. See, *e.g.*, *Floyd* v. *Bowen*, 833 F.2d 529, 531-532 (5th Cir. 1987); *Stieberger* v. *Bowen*, 801 F.2d 29, 30-38 (2d Cir. 1986); *Schisler* v. *Heckler*, 787 F.2d 76, 81-85 (2d Cir. 1986). See Pet. App. 6a. In these circumstances, claimant-initiated review "is preferable to a suit by administrative law judges, who are the umpires between claimants to social security benefits and the Social Security Administration" (*D'Amico* v. *Schweiker*, 698 F.2d at 906). The issue of ALJ standing to challenge the non-acquiescence policy has not divided the lower courts, and does not raise a question sufficiently important to warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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